

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6215

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PIERCE & STEVENS CHEMICAL CORP.,

Plaintiff-Appellee

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant.

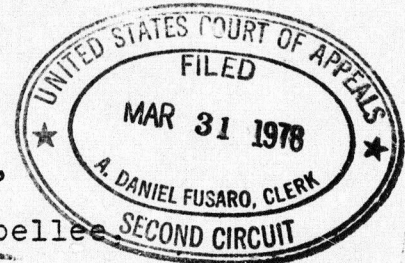
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

REPLY BRIEF

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We showed in our opening brief that Section 6(b)(1) of the Consumer Product Safety Act applies only when the Commission disseminates information in a public forum under circumstances where it is expressing its own views and vouching for the information; it does not apply to requests for documents under the Freedom of Information Act. We demonstrated that the Commission's interpretation of 6(b)(1) is the appropriate one because it is reasonable, effectuates the will of Congress, and carries out the purposes of

both the Consumer Product Safety Act and the Freedom of Information Act. Nothing in plaintiff's answering brief refutes this showing. Indeed, to a large extent plaintiff has not even challenged our showing. Accordingly, an extended response is not required and we wish only to make the following comments.

1. Contrary to plaintiff's suggestion (Brief 4-8), the Court's function on appeal is not limited to reviewing the district court's factual findings. We are not concerned here with questions of fact governing the exercise of the district court's discretion in which substantial deference is properly accorded to the findings of the district court. Instead, the district court granted the preliminary injunction based on its view (erroneous, as we have shown) that Section 6(b)(1) applies to FOIA requests (App. 69-73). "Although the granting or denial of a preliminary injunction is within the discretion of the court to which it is addressed, where it is plain that the disposition was in substantial measure a result of the lower court's view of the law, which is inextricably bound up in the controversy, the appellate court can, and should review such conclusions." Boussac v. Alexander's Dept. Stores, Inc., 299 F.2d 33, 35-36 (C.A. 2, 1962). As the court in Delaware & Hudson Ry. Co. v. United Transp. Union, 450 F.2d 603, 620-621 (C.A.D.C., 1971), certiorari denied 403 U.S. 911 (1971), explained:

Insofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court. The matter stands in

a different posture from that involved when there is no question or disagreement as to the legal principle involved, and the element of probability of success on the merits depends on a forecast as to the shape of the facts likely to emerge at trial. If the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound. The reversal of the trial judge in no way reflects a determination that he was unreasonable or arbitrary, or chargeable with an abuse of discretion, but only and simply that his premise as to the applicable rule of law is deemed erroneous by the appellate court.

Accord, Douglas v. Beneficial Finance Co. of Anchorage, 469 F.2d 453 (C.A. 9, 1972); Milsen Company v. Southland Corporation, 454 F.2d 363, 369 (C.A. 7, 1971); 11 Wright and Miller, Federal Practice and Procedure, p. 636. Since the issue before the Court in this case is exclusively one of law, i.e., whether the district court erred in holding that Section 6(b)(1) applies to Freedom of Information Act requests, this Court may exercise its full reviewing authority in resolving the question.

2. Plaintiff's additional suggestion (Brief 3) that the district court found that "there were serious other questions going to the merits" is not well taken. The thrust of the lower court's decision concerned its interpretation and application of Section 6(b)(1). The court assumed the truth of plaintiff's charge that the Commission was about to release inaccurate and misleading documents under the FOIA.^{1/} Holding 6(b)(1) to be applicable, the

^{1/} Plaintiff states that "[t]he Commission does not seriously dispute that misleading inaccuracies exist in the information which it prepares to release" (Brief 4-5). In support of this statement,

(Continued on page 4)

court found that disclosure of the alleged inaccurate and misleading reports would constitute irreparable injury (App. 68-69) and would cause greater harm to plaintiff than nondisclosure would to the Commission (App. 73-74). On these questions, the court also considered plaintiff's allegation that the Commission did not delete all trade secret information. However, as plaintiff itself recognizes elsewhere in its brief (Brief 6-7), the court discussed only the 6(b)(1) issue in that part of its decision concerning plaintiff's probability of success on the merits. After stating its belief that plaintiff "has met its burden to show a probability of success on the merits" because of its view of Section 6(b)(1), the court simply added that "[w]ithout doubt, there are sufficiently serious questions going to the merits to make them a fair ground

1/ (Continued from page 3)

plaintiff cites the district court's opinion which reported that "the CPSC has conceded that portions of the reports may be inaccurate and has offered to include a statement by P & S asserting its viewpoint along with the documents disclosed by the CPSC" (App. 68, n. 3). The Commission's Freedom of Information Officer explained the Commission's position that

because the information was so dated; because some of the claimed inaccuracies were so minor (in some cases merely a question of linguistics); and because there was no reasonably conceivable way to verify some of the information by its very nature; * * * the best course of action would be to allow Pierce and Stevens to submit a company statement to the Commission that would be released with the EIRs, even though the Commission was not required to do so.

(App. 48).

for litigation" (App. 73). The court did not address the myriad of alternative arguments plaintiff has contended support the preliminary injunction (Brief 6). Nor would it be appropriate for this Court to reach plaintiff's alternative arguments since each argument turns on factual questions which the district court did not resolve.^{2/} Rather, once this Court agrees with our position that Section 6(b)(1) does not apply to FOIA requests, the appropriate remedy is to vacate the preliminary injunction because it is based on an erroneous interpretation of 6(b)(1) and remand the matter to the district court for consideration of the factual questions.

3. Turning to the merits, we showed in our opening brief that the legislative history of Section 6(b)(1) is one of the factors which amply supports the Commission's interpretation and provides no support for plaintiff's conclusion that the 6(b)(1)

^{2/} Plaintiff's first two arguments -- "Whether the Commission received any FOIA request respecting any P&S product" and "assuming a FOIA request was made, whether it was not limited to one product only" -- are plainly factual questions. We note, however, that given the liberal disclosure requirements of the FOIA, an agency must have broad discretion to determine whether a request for information falls within the FOIA. This is especially true where, as here, the request for information was not made by an attorney.

Plaintiff's next argument, that the Commission did not delete "all confidential and trade secret information barred from disclosure by FOIA Exemption 4 and by CPSA Section 6(a)(2)" is also a factual question. The Commission recognized that it must withhold such information and did accept some of plaintiff's claims relating to trade secrets and confidential information (App. 31-32). Whether some additional information may fall within the scope of those provisions should be determined by the district court in the first instance and not for the first time on appeal.

procedures are to take the place of the FOIA in governing disclosure of requested documents. The only noteworthy aspect of plaintiff's answer on this point is its misleading approach.

Most importantly, we showed that when Congress amended the Act in 1976 it addressed the question involved here and agreed with our view (CPSC opening brief 16-19). We relied on the Conference Committee Report which states

The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.

Plaintiff would have the Court believe that the Conference Report only "commented that the protective requirements of Section 6(b)(1) did not conflict with the provisions of FOIA" (Brief 15-16). Far more significantly, Congress was aware of the very issue presented in this case (see CPSC opening brief 15-16) and it agreed with our view that Section 6(b)(1) operates independently from the FOIA and was "not intended * * * to supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. 552(a)(3) and (a)(6))." Thus, Congress explicitly intended to avoid the conflict between Section 6(b)(1) and 5 U.S.C. 552(a)(3) and (a)(6). This obvious conflict is between 6(b)(1)'s 30-day notice and comment period and the FOIA's requirement that agencies make records "promptly available to any person" (5 U.S.C. 552(a)(3)) and that

an agency respond to FOIA requests within ten days and administrative appeals within twenty days (5 U.S.C. 552(a)(6)). Under the district court's decision applying 6(b)(1) to FOIA requests, it is impossible for the Commission to comply with the specific expedited procedures of the FOIA.^{3/} The district court's decision thus flies in the face of the unambiguous Congressional intent. Plaintiff's attempt to minimize the importance of the Conference Report is understandable, but misleading.

Additionally, we cited (CPSC opening brief 13-14) testimony to show that during the Congressional hearings on the Consumer Product Safety Act the participants uniformly viewed 6(b)(1) as a way of assuring "truth in disclosure" when the Commission exercises its statutory power to disseminate information. For example, General Electric Company's representative explained:

[T]he public dissemination of the information so gathered carries with it a heavy responsibility. Issued under the dignity and with the apparent imprimatur of the U.S. Government, it will be repeated, summarized and carried by the media and so be used in the market place under circumstances and in a manner in which the government cannot control. If the information is premature, inaccurate or misleading, the consumers themselves will suffer. If it is identified with a company or product, it can have serious impact upon reputation, good will and market place results. Accordingly, we urge that the power to disseminate information carry with it the responsibility to be sure of its accuracy and that truth in disclosure be the governing statutory principle. (Emphasis added).

^{3/} Our opening brief detailed the numerous other ways that the 6(b)(1) procedures are inconsistent with the FOIA (CPSC opening brief 20-25).

The testimony cited by plaintiff (Brief 12-14) is not to the contrary. Plaintiff has not cited any legislative history which even indicates a Congressional intent to apply 6(b)(1) to FOIA requests. Indeed, for the most part, plaintiff has quoted, out of context, from the testimony we have relied upon. For example, plaintiff has quoted the testimony from General Electric's representative (Brief 13), but it has omitted the first two sentences which, importantly, make it clear that the witness was concerned about the Commission's statutory power to disseminate information.^{4/}

4. Plaintiff's primary argument (Brief 8-10) is based on the fact that both Section 6(a)(1) of the Consumer Product Safety Act,

^{4/} Similarly, plaintiff argues that

Secretary Elliot H. Richardson of H.E.W. observed the interrelation of the proposed CPSA with FOIA, stating that the provisions which later became § 6(b) of CPSA, would protect the Commission's 'refusal to disclose information not required to be released by the public information' provisions of FOIA (Hearings, p. 188).

(Brief 12). What plaintiff has quoted from is the Department of HEW's section-by-section analysis of H. R. 8110. The phrase plaintiff quotes discussed Section 4(c)(1) of H. R. 8110. In its context, the statement was "Section 4(c) would protect the Secretary's refusal to disclose information not required to be released by the public information section of what was formerly the Administrative Procedure Act (now 5 U.S.C. 552) * * *." Hearings on H. R. 8110 et al. Before the Subcomm. on Commerce and Finance of the Committee on Interstate and Foreign Commerce, 92d Cong., 1st and 2d Sess. 188 (1971-1972). This provision was adopted as Section 6(a)(1) and means only that the Commission is not required to release information which is exempt from compelled disclosure by virtue of the exemptions to the FOIA. It has nothing to do with the Section 6(b)(1) procedures. If plaintiff had read further, he would have discovered that Section 4(c)(2) (not 4(c)(1)) of H. R. 8110 was the predecessor of 6(b)(1) (Hearings, supra, at p. 7) and was discussed in the next paragraph of HEW's section-by-section analysis (Id. at 188).

15 U.S.C. 2055(a)(1), and Section 6(b)(1) refer to public disclosure of information. Plaintiff reasons that, in light of this fact, and because 6(a)(1) mentions the FOIA -- "Nothing contained in this chapter shall be deemed to require the release of any information described by subsection (b) of section 552 of Title 5 or which is otherwise protected by law from disclosure to the public" -- both sections must apply to Freedom of Information Act requests. This argument is highly strained and without merit.

It is true, of course, that Section 6 is captioned "Public disclosure of information" and that Section 6(b)(1) mentions public disclosure. However, it does not logically follow that Section 6(b)(1) applies to FOIA requests. Section 6(a) is consistent with Section 6(b) because they both pertain to public disclosure of information, but they concern different types of public disclosure. Section 6(a) includes FOIA requests. Section 6(a)(1) is simply a general statement that nothing in the Act requires the Commission to release information which is exempt from compelled disclosure by virtue of the FOIA exemptions or by some other law. Section 6(a)(2) requires the Commission to withhold trade secret or other confidential information. On the other hand, as we demonstrated in our opening brief, Section 6(b) involves only public disclosure of information initiated by the Commission. Therefore, plaintiff's argument must fail.

5. We must also comment on plaintiff's outrageous charge that if 6(b)(1) is not applied to FOIA requests, "[a] staff member of the Commission could easily pass along word to someone suggesting

that a FOIA request be made for damaging, albeit inaccurate and misleading Commission documents and such documents rife with inaccuracies, unfair innuendo and unjust accusations could then be released and competitive ruin ensue" (Brief 19). Plaintiff's allegation is nothing more than rank speculation that government officials would act contrary to the express will of Congress by performing acts which would constitute unethical conduct. There certainly is nothing in the record of this case to indicate that such actions have ever occurred. It need only be added, as the Supreme Court said in another context, that "[t]he presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926). ^{5/}

^{5/} Finally, it is noteworthy that plaintiff has not addressed our arguments concerning Exemption 3 of the FOIA. Compare CPSC opening brief 28-29 with plaintiff's brief 16-18.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening brief, the preliminary injunction should be vacated.

Respectfully submitted,

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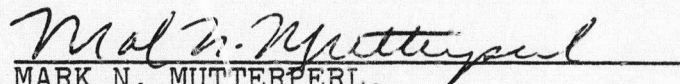
MARCH, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 1978, I served the foregoing Reply Brief upon counsel for all parties, by causing copies to be mailed, postage prepaid, to:

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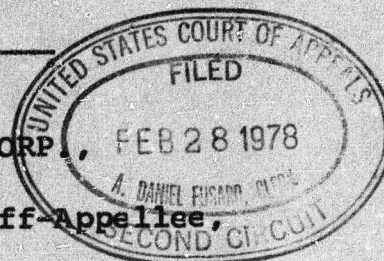
UNITED STATES COURT OF APPEALS
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B

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Plaintiff-Appellee,



v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR AMICUS CURIAE
CONSUMER FEDERATION OF AMERICA

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Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF AMICUS CURIAE CONSUMER FEDERATION OF AMERICA

*/

ISSUES PRESENTED FOR REVIEW

I. Whether Congress, in adopting the procedural requirements of § 6(b)(1) of the Consumer Product Safety Act, intended only to encompass the affirmative publication of information by the Commission, or also to substitute those requirements for the disclosure scheme already established by the Freedom of Information Act.

*/ For a description of amicus curiae, see Consumer Federation of America's Memorandum in Support of Motion for Leave to File Brief as Amicus Curiae.

II. Whether § 6(b)(1) of the Consumer Product Safety Act, which does not require or authorize non-disclosure but only establishes procedural requirements prior to disclosure, is a "withholding statute" under exemption three of the Freedom of Information Act.

STATEMENT OF THE CASE

This case is before the Court on the appeal of defendant-appellant United States Consumer Product Safety Commission ("CPSC" or "Commission") from an order, issued by the United States District Court of the Western District of New York (Elvin, J.), preliminarily enjoining the Commission's disclosure of three records requested by a third party under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, 439 F. Supp. 247 (W.D.N.Y. 1977). The three records requested, i.e., two establishment inspection reports concerning plaintiff-appellee Pierce & Stevens Chemical Corp. ("P & S") and a letter to P & S, were prepared by employees of the United States Food and Drug Administration ("FDA") at least eight years ago but, at all times relevant to this case, were in the possession of the Commission. After receiving requests for these records under the FOIA, the Commission allowed P & S to designate the portions of the records P & S deemed to be trade secrets or

confidential in nature and thus exempt under subsection (b) (4) of the FOIA. The Commission deleted portions of the records it determined to be covered by exemption four and notified P & S of its intention to release the records under the FOIA. Upon receipt of that notification, P & S commenced this action seeking to enjoin the disclosure of the remaining portions of the records.

The court below, upon P & S' motion for preliminary injunctive relief, determined that § 6(b) (1) of the Consumer Product Safety Act ("CPSC" or the "Act"), 15 U.S.C. § 2055(b) (1), is applicable to disclosures pursuant to FOIA requests and that § 6(b) (1) is a "withholding statute" under exemption three of the FOIA, 5 U.S.C. § 552(b) (3). Further, the court found that the Commission had failed to comply with § 6(b) (1) and, therefore, enjoined the disclosure of the records.

There are a variety of issues raised by this case, including whether the Commission complied with § 6(b) (1)'s procedures and whether the court below properly applied the criteria for preliminary injunctive relief, which are not discussed in this amicus brief. Amicus will only address the issue of statutory construction at the heart of the district court's memorandum and order, i.e. whether non-compliance with the procedures prescribed by § 6(b) (1) constitutes a bar to the disclosure of information requested under the FOIA.

SUMMARY OF ARGUMENT

In Part IA of this brief amicus will detail the practical effect of requiring the Commission, in the context of a request for records under the FOIA, to fulfill the procedural requirements of § 6(b)(1), including verifying the accuracy of the information requested. Amicus will discuss the inconsistency between the § 6(b)(1) procedures and the general mandate and procedural requirements of the FOIA. Section 5(b)(1)'s time-consuming procedures are contrary to the FOIA's emphasis on prompt mandatory disclosure.

In Part IB amicus will argue that neither the language of § 6(b)(1) nor its legislative history support its application to FOIA requests. Instead, amicus will urge, Congress intended § 6(b)(1) to be applicable only to the publication of information initiated by the Commission. Accordingly, manufacturers and private labelers are protected from the Commission's intrusion into the marketplace through its publication of inaccurate consumer product safety information. Yet, the FOIA's disclosure scheme is left undisturbed.

In Part II, amicus will support this reading of § 6(b)(1) by arguing that § 6(b)(1) is not a withholding statute within exemption three of the FOIA. Section 6(b)(1) merely establishes procedures to be followed prior to disclosure and does not require or authorize the withholding of information.

Consequently, the district court erroneously interpreted § 6(b)(1) to be applicable to FOIA requests, and the Court should reverse the order enjoining disclosure of the requested records.

ARGUMENT

I. SECTION 6(b)(1) OF THE CONSUMER
PRODUCT SAFETY ACT DOES NOT
APPLY TO RECORDS REQUESTED UNDER
THE FREEDOM OF INFORMATION ACT

The district court determined that § 6(b)(1), which was enacted as part of the original CPSA in 1972, is applicable to all requests for records under the FOIA. However, such a construction is not required by the terms of § 6(b)(1), is contrary to the legislative history of § 6(b)(1), and is inconsistent with the mandatory prompt disclosure requirements of the FOIA.

A. THE PROCEDURAL REQUIREMENTS OF § 6(b)(1)
ARE INCONSISTENT WITH THE DISCLOSURE
SCHEME OF THE FOIA

Section 6(b)(1) generally provides that information obtained by the Commission under the CPSA, from which the identity of a manufacturer or private labeler may be readily ascertained,

may not be publicly disclosed until certain procedures are completed. Specifically, § 6(b)(1) postpones any public disclosure of such information until the manufacturer or labeler is given 30 days notice and a reasonable opportunity to comment, and until the Commission takes "reasonable steps to assure" that the information is "accurate" and that disclosure would be "fair in the circumstances" and "reasonably related to effectuating the purposes" of the CPSA. ^{*/}

The procedures required by § 6(b)(1) are potentially extremely time-consuming. This pre-disclosure process, while requiring a minimum of 30 days, as a practical matter is often likely to extend far beyond that span of time. Requiring the Commission to take "reasonable steps to assure" the accuracy of all information to be disclosed ^{**/} would entail an independent Commission investigation of information received from non-Commission sources. ^{***/} Even assuming the Commission had adequate staff,

^{*/} Section 6(b)(1) is set out in Appendix A.

^{**/} The district court's interpretation would require the Commission to follow § 6(b)(1)'s procedures whenever the Commission seeks to disclose consumer product safety information. Of course, because of the FOIA's mandatory disclosure requirements, this in effect establishes this requirement whenever the Commission receives a request for non-exempt material.

^{***/} In this case, although the Commission was in possession of the records at the time they were requested, the Commission did not create the records or prepare the information. Moreover, the information is over eight years old, rendering the verification task even more difficult.

this process would often result in lengthy delays. Such investigations would require a massive expenditure of Commission resources and time. For example, in order for the Commission to disclose the content of a single consumer product safety complaint, it could be required to consider whether in fact a particular product caused an injury to a particular consumer and whether the product complained of poses a substantial hazard to the public safety. Given the complexities of consumer product failure, this would prove to be a major task. Similarly, for extensive product studies, tests or compilations of safety data, reasonable assurances of accuracy would require inestimable ^{*/} Commission staff time and energies.

Inasmuch as § 6(b)(1) sets no maximum time limit for Commission investigations, it does not prevent or even discourage lengthy investigations. Moreover, to prevent court challenges alleging that the Commission failed to take "reasonable steps" to determine the accuracy of information, the Commission might well be encouraged to undertake careful, and lengthy, investigations prior to the disclosure of information. ^{**/}

^{*/} Consider the implications of the following illustration. The Commission retains a technical consultant to prepare a report considering the potential hazard posed by a particular consumer product. Query what the Commission is obligated to do under § 6(b)(1) if the consultant's report is requested under the FOIA. Is the Commission required to study the technical soundness of the study it originally requested? Should it commission another study to evaluate the accuracy of the first study? It is difficult to believe Congress intended such an absurd result.

^{**/} Indeed, in light of the effort involved in fulfilling [footnote continued on page 8]

The time-consuming procedures of § 6(b)(1) are inconsistent with the general mandate and particular procedures of the FOIA. In enacting the FOIA, Congress restructured § 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964), and adopted a sweeping revision "whose basic purpose reflected 'a general philosophy of full agency disclosure.'" Department of Air Force v. Rose, 425 U.S. 352, 360 (1976), quoting S. Rep. No. 89-814, 89th Cong., 1st Sess. 3 (1965). As the Supreme Court noted in EPA v. Mink, 410 U.S. 73 (1973),

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. 410 U.S. at 80; see also Department of Air Force v. Rose, supra, 425 U.S. at 361.

Yet the district court's reading of § 6(b)(1) would, in addition to creating the procedural conflicts noted below, completely undercut the basic thrust of this important remedial legislation. The FOIA's overriding emphasis on disclosure

[footnote continued from page 7]

§ 6(b)(1)'s procedures, Commission staff might be anxious to find ways to avoid disclosure, such as giving an excessively broad reading to the FOIA's exemptions.

would effectively be undermined, with respect to the Consumer Product Safety Commission, by the delay and uncertainty inherent in § 6(b)(1)'s procedures.

The FOIA contains a particular procedural framework designed to effectuate the Congressional goal of government disclosure under the FOIA. Each agency which receives a request for records must initially determine whether to comply with that request within ten working days, 5 U.S.C. § 552(a)(6)(A)(i), and is required to make prompt disclosure of all non-exempt documents, 5 U.S.C. § 553(a)(3). ^{*/} See also H.R. Rep. No. 93-876, 93d Cong., 2d Sess. 2 (1974). Clearly the Commission could never meet this timetable or provide prompt disclosure, when faced with an FOIA request, if it were required to provide a 30 day comment period and reasonably assure the accuracy of consumer product safety information. Given the potential for open-ended delays while the Commission attempts to verify the accuracy of information, compliance with § 6(b)(1), in the context of an FOIA request, would undermine the FOIA's fundamental objective of prompt disclosure. Therefore, the application of § 6(b)(1) to FOIA requests would provide little public access to records produced or received by the Commission and, therefore, little

^{*/} Although when the CPSA was enacted the FOIA did not have a specific timetable for responses to requests, it did require "prompt disclosure." Pub. L. No. 90-23, 81 Stat. 54 (1967).

opportunity for public insight into the activities of the Commission. ^{*/}

Accordingly, § 6(b)(1)'s procedures are clearly at odds with the procedural and substantive mandate of the FOIA. If the district court's reading is to be accepted, this Court must conclude that Congress intended to repeal the carefully constructed scheme of the FOIA where an individual requester seeks information from the Commission. As discussed below, such a reading is not only unwarranted; it is also contrary to a fair reading of the statute, and the relevant legislative history.

B. BOTH THE LANGUAGE AND LEGISLATIVE HISTORY OF § 6(b)(1) INDICATE CONGRESS' INTENT TO LIMIT § 6(b)(1) TO THE PUBLICATION OF INFORMATION INITIATED BY THE COMMISSION

Neither the language of § 6(b)(1) nor its legislative history supports the district court's application of § 6(b)(1) to FOIA requests. A careful analysis reveals no Congressional intention to undermine the procedural and substantive framework of the FOIA with respect to consumer product safety information.

^{*/} One by-product would be to undercut a significant means of overseeing the efforts of the Commission. Once information is the subject of an administrative or judicial proceeding under the CPSA, the procedures of § 6(b)(1) need not be invoked prior to disclosure. § 6(b)(2), 15 U.S.C. § 2055(b)(2). But, information obtained under the CPSA about which the Commission takes no action, remains subject to § 6(b)(1). Therefore, if [footnote continued on page 11]

Rather, both the language and the legislative history of § 6(b)(1) indicate Congress' intent to apply that provision's procedures only to the affirmative publication of information by the Commission. By giving § 6(b)(1) this limited reach, Congress avoided doing violence to its overriding concern for prompt mandatory disclosure under the FOIA.

Section 6(b)(1) makes repeated reference to the "public disclosure" of information by the Commission. We submit that, by using the word "public," Congress meant something more than mere disclosure, particularly when considered in light of the FOIA, which requires the release of information upon request. ^{*/} This conclusion is buttressed by contrasting § 6(b)(1)'s procedures for "public disclosure" with § 6(a)(2)'s ban of the "disclosure" of trade secrets and other confidential business information. ^{**/} It would indeed be anomalous for

[footnote continued from page 10]

§ 6(b)(1) applied to FOIA requests, information concerning Commission proceedings could be disclosed, but the information relating to the failure of the Commission to institute appropriate actions could not be brought promptly to light using the FOIA.

^{*/} Otherwise the word "public" serves no purpose. It is a well recognized rule of statutory construction that the words of statutes are to given effect and not to be construed as surplusage. *Klein v. Republic Steel Corp.*, 435 F.2d 762, 766 (3d Cir. 1970). "Words in statutes should not be discarded as 'meaningless' or 'surplusage' when Congress specifically included them, particularly where the words are excluded in other sections of the same act." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

^{**/} Section 6(a)(2), which imposes an absolute ban on the
[footnote continued on page 12]

Congress, in the same section of the CPSA, to utilize such different terminology if it intended the same coverage. Therefore, from the face of the statute it appears that Congress enacted § 6(b)(1) to cover something other than the simple disclosure of information, and therefore, not to interfere with the prompt disclosure requirements of the FOIA.^{*/} This intent becomes clear upon an examination of the purpose of § 6(b)(1) and its legislative history.

Although the contemporaneous legislative history of § 6(b)(1) is sparse, it is apparent that Congress feared the Commission might affirmatively publicize product safety information, which was unfair or inaccurate, and thereby damage the reputations of consumer products, manufacturers and labelers.^{**/} It is to this affirmative publication of information, as an extension of the Commission's enforcement mechanism, that Con-

[footnote continued from page 11]
disclosure of trade secrets and other confidential business information, is an exemption three statute under the FOIA.
See discussion in Part II, infra.

^{*/} This reading is buttressed by later language in § 6(b)(1) which would seem to require the Commission, before making the disclosure, to weigh the fairness "in the circumstances" and to be assured that disclosure is "related to effectuating the purposes of this Act." Such considerations, while clearly relevant to Commission initiated disclosure, have no bearing on disclosures of otherwise non-exempt material under the FOIA.
See n. ^{*/} at 20, infra.

^{**/} Part of the Commission's function is to "disseminate injury data, and information, relating to the causes . . . of death, injury, and illness associated with consumer products." 15 U.S.C. § 2054(a)(1).

gress sought to attach procedural protections. See 118 Cong. Rec. 31389 (September 20, 1972) (remarks of Representative Crane). The harm associated with the disclosure of inaccurate or unfair consumer product safety information is only significant where the Commission places its imprimatur on the material by initiating its publication. Absent the Commission's affirmation of the information, the weight of the Commission's authority simply is not introduced into the marketplace.

This interpretation is bolstered by other aspects of the contemporaneous legislative history. In the House Report, there are numerous references to the Commission "disseminating" information. H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 32 (1972). The use of this term implies that the House Committee, which drafted the version of § 6(b)(1) which eventually became law, was concerned with affirmative Commission disclosures, rather than responses to FOIA requests. Releasing information to an FOIA requester can not accurately be described as "disseminating" that information.

Similarly, as legislative history notes, § 6(b)(1) requires that if the Commission improperly discloses inaccurate or misleading information, the Commission must "publish a retraction in a manner similar to that in which the original disclosure was made." Id. (emphasis added). As it is virtually impossible

to "publish" a retraction in a manner similar to the release of records pursuant to the FOIA, this is a further indication that Congress did not contemplate the application of § 6(b)(1)'s procedures to FOIA requests. ^{*/}

But perhaps the most telling aspect of the legislative history is the utter lack on any hint that Congress intended § 6(b)(1) to cover requests made under the FOIA. As indicated above, only a few years before, Congress carefully developed a procedural and substantive scheme for guaranteeing public access to information in the hands of government officials. The procedures of § 6(b)(1) are wholly inconsistent with the scheme of the FOIA. Yet, the district court's reading implies that Congress, without a word of explanation, and through the use of language not fitting the individualized release to an FOIA requester, made a major exception to its mandate of prompt

^{*/} Yet, without citation to any legislative history, the district court determined that § 6(b)(1) is applicable to FOIA requests. The only hint of attention to the legislative history is the court's reliance on GTE Sylvania, Inc. v. Consumer Product Safety Comm'n, 404 F. Supp. 352 (D. Del. 1975) (GTE Sylvania I). However, GTE Sylvania I's sole reference to the legislative history was to a comment made by Ralph Nader at hearings before a House Subcommittee. 404 F. Supp. at 370 n. 76. In discussing a consumer product safety bill that never passed Congress, and contained no disclosure limitation similar to § 6(b)(1), Mr. Nader merely commented that all information obtained by the Commission should, except as exempted by the FOIA, be subject to disclosure. Hearings on H.R. 8110, H.R. 8157, H.R. 260 (and identical bills) and H.R. 3813 (and identical bills) before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st & 2d Sess. 897-98 (1972). Therefore, this statement by Mr. Nader sheds no light whatsoever on the Congressional intent behind § 6(b)(1). In short, there is no legislative history which supports the construction of § 6(b)(1) made by the court below.

disclosure. We submit that such an interpretation of § 6(b)(1)'s passage is unreasonable.

This reading of § 6(b)(1) is clearly confirmed by the CPSA's subsequent legislative history. In 1976, § 29 of the CPSA, 15 U.S.C. § 2078(e), was amended to prohibit any agency that received information, which was obtained by the Commission under the Act, from releasing that information unless the Commission complied with § 6(b)(1).^{*/} The Conference Report, in discussing this amendment, stated:

The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees to supersede or conflict with the requirements of the Freedom of Information Act (5 U.S.C. § 552(a)(3) and (a)(6)).
The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the Freedom of Information Act.
(emphasis added) H.R. Rep. No. 1022, 94th Cong., 2d Sess., 27 (1976).

Inexplicably, the district court failed to even discuss this clear expression by Congress that it did not intend § 6(b)(1) to be applicable to FOIA requests. Here, the subsequent legislative history clearly affirms the apparent Congressional intent, as it may be determined from

^{*/} Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 15, 90 Stat. 510 (1976).

the face of the statute and the prior legislative history, and is consistent with the purposes and intent of the FOIA. Under circumstances such as these, the Supreme Court has indicated that subsequent expressions of Congressional intent "are entitled to great weight in statutory construction."

Glidden v. Zdanok, 370 U.S. 530, 540-42 (1962); see also,
*
Texas v. Louisiana, 410 U.S. 702, 711 (1973).

Therefore, a careful analysis of the language of § 6(b)(1) and the full legislative history reveals that Congress did not intend to apply § 6(b)(1)'s procedures to requests under the FOIA. Moreover, to interpret § 6(b)(1) otherwise would do violence to the FOIA's requirement of prompt disclosure, and attribute to Congress a sub silentio repeal of the FOIA with respect to consumer product safety information.

*/ Although subsequent legislative history may be of little value in inferring the Congress' prior intent where the subsequent legislative history is not a clear statement of intent or where it conflicts with the "plain congressional purpose" as expressed in the prior legislative history, it is of particular value in the instant case. Compare United States v. Philadelphia National Bank, 374 U.S. 321 (1963) and United States v. Price, 361 U.S. 304 (1960) with the cases cited in the text. But see GTE Sylvania v. Consumer Product Safety Commission, Civil Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-131, 75-136, 75-150, 75-151 and 75-152 (D. Del. December 8, 1977) (GTE Sylvania II) Slip. Op. at 5-7.

II. SECTION 6(b)(1) OF THE CONSUMER PRODUCT SAFETY ACT IS NOT A WITHHOLDING STATUTE UNDER EXEMPTION THREE OF THE FREEDOM OF INFORMATION ACT

A further indication that Congress did not intend § 6(b)(1) to be applicable to FOIA requests is that § 6(b)(1) is not a withholding statute under exemption three of the FOIA, 5 U.S.C. § 552(b)(3). Under the FOIA, records possessed by an agency must promptly be disclosed unless the material falls within one or more of the FOIA's nine exemptions. EPA v. Mink, 410 U.S. 73, 79 (1973). Therefore, the otherwise non-exempt material requested in this case must promptly be disclosed if § 6(b)(1) is not an exemption three statute.

Subsection (b)(3) of the FOIA permits the withholding of material covered by a limited and narrow class of substantive statutes. Prior to its amendment in 1976, exemption three applied to material "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1970) as amended (1976). Statutes falling under (b)(3) were actual withholding statutes i.e., substantive authorizations or commands not to disclose rather than procedural mechanisms for disclosure. See, e.g., Administrator, FAA v. Robertson, 422 U.S. 255 (1975).
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*/ In Robertson the Supreme Court held that 49 U.S.C. § 1421, which authorizes the withholding of information if in the public interest, is a (b)(3) statute. The 1976 amendment to subsection (b)(3) was enacted to overrule Robertson. H.R. Rep. No. 94-1441 94th Cong., 2d Sess. 25 (1976).

In the 1976 amendments,^{*/} Congress further narrowed the reach of (b)(3) by exempting from disclosure only those matters,

specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3).

Like its predecessor, the 1976 version of § 552(b)(3) requires the substantive authorization or command to withhold material. However, it additionally requires that the authorization either be absolute, refer to particular matters or establish particular substantive criteria for the exercise of the authorization. See Seymour v. Barraba, 559 F.2d 806 (D.C. Cir. 1977) (construing 13 U.S.C. § 9, information obtained for census purposes may not be disclosed for any non-census purpose); Founding Church of Scientology v. National Security Agency, 434 F. Supp. 632 (D.D.C. 1977) and Kruh v. GSA, 421 F. Supp. 965 (E.D.N.Y. 1976) (construing Pub. L. 86-36, § 6, 73 Stat. 64 (1959), information concerning the functions of the National Security Agency may not be disclosed).

Section 6(b)(1) is not a (b)(3) statute as it fails to require or authorize non-disclosure. This failure is highlighted

^{*/} Government in the Sunshine Act, Pub. L. 94-409, § 5(b), 90 Stat. 1241 (1976).

by contrasting § 6(b)(1) with § 6(a)(2) of the CPSA, 15 U.S.C. § 2055(a)(2), which clearly flatly bars the disclosure of trade secrets or other confidential business information. Section 6(b)(1), on the other hand, merely establishes proce-
dures to be followed when material is to be disclosed. ^{*}/ Under § 6(b)(1), prior to the public disclosure of certain consumer product safety information, the Commission must provide each manufacturer or labeler identified in the information with at least 30 days notice and a reasonable opportunity to comment on the information and take "reasonable steps to assure" that the information is "accurate." Once these procedures have been complied with, any information covered by § 6(b)(1) must be disclosed. We submit that these pre-disclosure procedures fail to satisfy § 552(b)(3)'s requirement that there be a commandment or an authorization of non-disclosure according

^{*}/ The problem facing requesters of information is that compliance with § 6(b)(1)'s procedures severely burdens and delays the ultimate disclosure of non-exempt material which is subject to the FOIA's mandatory disclosure requirements. This situation should be contrasted with the utilization of procedures to govern the discretionary disclosure of material which is exempt, under § 552(b), from the mandatory disclosure requirements of the FOIA. See also Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1184 (3d Cir. 1977), petition for cert. filed 46 U.S.L.W. 3485 (January 31, 1978) (No. 77-922). In the latter circumstances, procedural impediment to discretionary disclosure is not inconsistent with the FOIA.

to particular criteria. ^{*/}

Nevertheless, the court below construed § 6(b)(1)'s procedures to constitute an independent bar to the disclosure of otherwise non-exempt material. Under this reasoning, non-exempt material would be withheld during the entire time the Commission is attempting reasonably to assure the accuracy of the information requested. ^{**/} Such a scheme requires a complete repeal of the FOIA's procedural framework for certain CPSC material, through the avenue of the FOIA's exemption three. Amicus believes that Congress did not intend exemption three to provide such a procedural exemption and that the district court erred in so reading the FOIA.

^{*/} We do not understand Pierce and Stevens to argue, or the court below to have found, that § 6(b)(1) provides a substantive basis for non-disclosure, even after adequate steps are taken to ensure the accuracy of the requested information. But see § 6(b)(1)'s reference to disclosure being "fair in the circumstances and reasonably related to effectuating the purposes of this Act." Application of this vague terminology to FOIA requests clearly would be contrary to the FOIA's (b)(3) exemption and represent a wholesale repeal of the FOIA as it applies to the Commission. See n. ^{*/} at 12, supra. The 1976 amendment to subsection (b)(3) was enacted precisely to remove such open-ended agency discretion. See n. ^{*/} at 17, supra.

^{**/} Presumably, the Commission could not refuse or fail to take reasonable steps to assure the accuracy of the information. See n. ^{**/} at 6, supra. But see GTE Sylvania II, supra. "[I]f the Commission fails to take reasonable steps . . . the information will be exempt from disclosure under FOIA exemption 3" Slip Op. at 23.

CONCLUSION

Section 6(b)(1)'s time-consuming procedures, which include requiring the Commission to reasonably assure the accuracy of information, are inconsistent with the FOIA's broad mandate and procedural framework of prompt disclosure. Furthermore, both the language and the legislative history of § 6(b)(1) make clear that Congress intended § 6(b)(1) only to be applicable to Commission initiated publication of information. In this fashion, Congress adequately protected manufacturers and private labelers from inaccurate product safety information that bears the Commission's imprimatur, without interfering with the FOIA's disclosure scheme.

This reading of § 6(b)(1) is buttressed by the fact that § 6(b)(1) does not constitute a withholding statute under exemption three of the FOIA. Section 6(b)(1)'s mere procedural requirements prior to disclosure do not constitute a requirement or authorization to withhold information.

For the foregoing reasons, the district court's interpretation of § 6(b)(1) to be applicable to FOIA requests was erroneous and its order issuing a preliminary injunction

barring the release of three records requested under the
FOIA should be reversed.

Respectfully submitted,

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APPENDIX A

Section 6(b)(1) of the Consumer Product Safety Act provides:

Except as provided by paragraph (2) of this subsection, not less than 30 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the Commission finds out that the public health and safety requires a lesser period of notice), the Commission shall, to the extent practicable, notify, and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the Commission in regard to such information. The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. If the Commission finds that in the administration of this Act, it has made public disclosure of inaccurate or misleading information which reflects adversely upon the safety of any consumer product, or the practices of any manufacturer, private labeler, distributor, or retailer of consumer products, it shall, in a manner similar to that in which such disclosure was made, publish a retraction of such inaccurate or misleading information.

15 U.S.C. § 2055 (b) (1) .